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Protecting “university” as a designation

Analysis and comparison of the legal position in several countries

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1. Introduction

General

On 18 June 2009 the Lower Chamber of the Dutch Parliament adopted a resolution, which stated that the behaviour of institutions, bearing designations like “universiteit”, “university” or “university of applied sciences” while they are not entitled to issue legally recognised degrees or diplomas, is misleading and confusing. As a result, Parliament called on the government to find out whether, and to what extent, such designations can be protected by law.

Insiders know that the background of the resolution is not a typical Dutch problem. During the last few decades higher education systems of countries in and outside Europe have changed rapidly. For the purpose of this contribution two main developments could be distinguished. Firstly, universities are no longer considered to be the exclusive institution of higher education. Today in Europe, the binary system accommodating a university and non-university sector is predominant.[2] Obviously, there is a need within every binary system to legally distinguish the university from something else. Secondly, a rapid expansion and spread of private higher education institutions has taken place worldwide. It shows that a market of higher education has emerged, which calls for effective legal instruments to prevent “bad” suppliers from doing their harmful work.

Binary systems – academic drift

During the 1960s a substantial increase in student numbers took place. A process of “massification” of higher education commenced, which had its own logic and induced significant changes in the national systems.[3] At that time it was generally assumed, as Teichler points out

> “that only diverse study provisions would suit the variety of students’ motives, talents and career prospects. An expansion of traditional universities with a close link of research and teaching in accordance with the growing student numbers was

[1] This contribution is the adaptation of a Dutch-language research report, written in co-operation with Anton Nijssen at the request of the Ministry of Education, Culture and Science in The Hague, and published in January 2010. The author is grateful for the information provided by the following experts, without whose help this research would not have been possible: Jan De Groof (Belgium), Elisabeth Fiorioli (Austria), Nick Park, Philip Vine, Neville Harris (UK), Jim Jackson (Australia) and Cornelia Stöcklein (Germany). Any errors are the responsibility of the author.

[2] Maria de Lourdes Machado, José Brites Ferreira, Rui Santiago and James Taylor, Reframing the Non-University Sector in Europe: Convergence or Diversity?, in: James Taylor, José Brites Ferreira, Maria de Lourdes Machado, Rui Santiago (eds.), *Non-University Higher Education in Europe*, Dordrecht, Springer Netherlands 2008, p 245.

[3] Philip G. Altbach, The Logic of Mass Higher Education, *Tertiary Education and Management*, vol. 5, nr. 2/June 1999, p 105-122.

considered too costly. Last but not least, the general concept of system theory was widely accepted that a growing system can only fulfil its tasks in the process of growth if it diversifies both institutionally and substantially."[4]

As a result, the establishment of a two-type institutional structure of the higher education system was realized in many European countries "by means of upgrading vocational training institutions to non-university higher education institutions."[5] In this way the German and Austrian "Fachhochschulen", the Dutch and Flemish "hogescholen", the Norwegian "høgskolen", the Irish "institutes of technology", the Portuguese "instituto politécnico" and the Finnish "ammattikorkeakoulu" have come into being. But also countries that have not a clear binary higher education system in the institutional sense, like the UK since it has upgraded its polytechnics to universities in 1992, are aware of at least a functional division between university and non-university education.[6]

In almost every country this situation calls for rules and measures to "define" the university. The university and non-university sector live apart together. The general idea is that objective criteria are required to protect the university, its idea, leading role, status and old traditions against the coming and presence of relative new non-university higher education institutions.[7] The preservation of a unitary higher education system – as for example in Italy, Sweden and Spain –[8] has not gained wide popularity. Nor did the efforts of establishing comprehensive universities (like the German "Gesamthochschule"), that had different types of study programmes and degrees under a single institutional roof.[9] But do we really know what universities stand for? The process of massification and diversification of higher education has changed the views about the university and its relationship to the state. Nowadays, we often speak about different types of universities: "mass universities" and "elite universities";[10] "teaching universities" and "research universities";[11] "Humboldtian universities", "post-Humboldtian universities" and "pre-Humboldtian universities";[12] "state

[4] Ulrich Teichler, The End of Alternatives to Universities or New Opportunities?, in: James Taylor et alia (eds.), *Non-University Higher Education in Europe*, op.cit, p 3.
[5] Teichler, op.cit, p 4.
[6] John Brennan and Ruth Williams, Higher Education Outside the Universities: The UK Case, in: James Taylor a.o. (eds.), *Non-University Higher Education in Europe*, op.cit, pp. 231-244.
[7] The national strategies for institutionalizing the binary system differ however. Teichler has observed that: (a) in some countries different routes of secondary education and vocational training are required for entering universities and other higher education institutions; (b) in some countries the study programmes of other higher education institutions are shorter and degrees and certificates are clearly distinct; (c) most countries have an overlap of or a relatively small difference between the job perspectives of graduates, while in a few countries the career prospects differ substantially; (d) in some countries, most teachers at other higher education institutions are well qualified for research tasks, while in other countries, they are hardly qualified for these tasks; (e) countries vary with respect to the extent to which salaries, status and job assignments differ between the academic staff at universities and other higher education institutions. See Teichler, op.cit, p 7.
[8] Maria de Lourdes Machado et alia, Reframing the Non-University Sector in Europe: Convergence or Diversity?, op.cit, p 247.
[9] Teichler, op.cit, p 4.
[10] Teichler, op.cit, p 6.
[11] Rosemary Deem, Conceptions of Contemporary European Universities: to do research or not to do research?, *European Journal of Education*, vol. 41, nr. 2, 2006, p 281-304.
[12] U. Schimank and M.W. Winnes, Beyond Humboldt? The relationship between teaching and research in European university systems, *Science and Public Policy*, 27, 2000, p 397-408.

universities" and "market oriented universities";[13] "universities" and "multiversities",[14] and so on. The fact that modern universities have various faces makes it hard to define their identity. Moreover, it is difficult to find substantial arguments for denying the right of non-university higher education institutions to act as universities or for preventing them to become universities.[15] And that is a serious matter, if we realize that the "academic drift" of non-university higher education institutions, in other words their ambition to raise their status in comparison to universities by attempting to become more similar to universities, "seems to be becoming dominant over time" in Europe.[16] Therefore, the search for policymakers to new clear rules should already be understandable in the interest of quality (higher) education and the position of the students.

Market supervision

But there is more. Experts estimate that nowadays thirty per cent of the global higher education enrolment is private.[17] Although Western Europe is a striking exception to this development – after all, our 'entrepreneurial universities' are basically public universities – private institutions are not an unperceived phenomenon in this area.[18] In fact, their presence has given rise to new questions how to balance the national higher education system between the poles of freedom and quality education.

"Private" refers to several notions that, combined, are squarely within the traditional West European education culture: non governmental, non national, commercial and entrepreneurial.[19] However, during the last few decades our governments have learned to look at higher education as a market, in which regulation and quality control for the sake of

[13] Marek Kwiek, The State, the Market, and Higher Education. Challenges for the New Century, in: Marek Kwiek (ed.), *The University, Globalization, Central Europe*, Frankfurt a/Main and New York: Peter Lang, 2003, pp. 71-114.

[14] Altbach, The Logic of Mass Higher Education, op.cit, p 116.

[15] Also within one country, such as the UK, criteria can differ between the different parts. If a Higher Education College in England and Wales has possessed degree-awarding powers for taught courses and has more than 4,000 students, it can apply for university title. In Scotland and Northern Ireland, a Higher Education College must not only have taught but also research-degree awarding powers before it can apply for university title. See John Brennan and Ruth Williams, Higher Education Outside the Universities: the UK Case, op.cit, p 237.

[16] Teichler, op.cit, p 7. On the other hand some authors are mentioning the "professional drift" as a movement that has infected all higher education institutions, see Maria de Lourdes Machado et alia, Reframing the Non-University Sector in Europe: Convergence or Diversity?, op.cit, p 257.

[17] D. Levy, Growth and typology, in: Svava Bjarnason, Kai-Ming Cheng, John Fielden, Maria-Jose Lemaitre, Daniel Levy, N.V. Varghese, *A New Dynamic: Private Higher Education*, UNESCO, (Paris 2009), p 7, with references. The rate of private higher education institutions is the highest in Asia, Latin America and Eastern Europe, see Levy, op.cit, p 9-14.

[18] Levy, op.cit, p 11. We should be aware of the fact that what we mean by 'public' and 'private' is open for discussion, see for instance Alma Maldonado, Private higher education: trends in research, in: Alma Maldonado, Yingxia Cao, Philip G. Altbach, Daniel C. Levy, Hung Zhu, *Private higher education: an international bibliography*, Boston College Center for International Higher Education, (Chestnut Hill 2004), p 1-3. Here, we consider institutions to be public when they are public law institutions or non public law institutions – like in the Netherlands and Belgium – that are funded and predominantly regulated by the state. The term private institution is then preserved to the ones that are non public, not predominantly regulated by the state and/or not funded.

[19] Charles Glenn and Jan De Groof, *Balancing freedom, autonomy and accountability in education*, vol. 1, (Nijmegen 2005), p 64.

consumer protection should assume an important place.[20] An old and familiar type of protective legislation in this field, which is in use in almost every country, comprises provisions holding punitive measures against the unlawful granting or carrying of academic degrees or titles. Such provisions appear to be an effective instrument to fight the modern "diploma mills", known in the UK as "degree mills".[21] To give an idea of what is meant by the term "diploma mill", we could use the essentials of a definition laid down in a recent bill, proposed by a member of the United States House of Representatives, the New York Democrat Tim Bishop:

> "any entity that
> (A) lacks valid accreditation by an agency recognised by a Federal agency, a State government, or the Council for Higher Education Accreditation as a valid accrediting agency of institutions of higher education; and
> (B) offers degrees, diplomas, or certifications, for a fee, that may be used to represent to the general public that the individual possessing such a degree, diploma, or certification has completed a program of education or training beyond secondary education, but little or no education or course work is required to obtain such a degree, diploma, or certification."[22]

The providers concerned, present themselves often as a university, with names that sometimes resemble those of recognised institutions, such as Saint Regis University in the United States[23] or the Irish International University, in London,[24] and that use the internet as their hunting ground. We should realize that, at least in the Western world, every country has a formal procedure for officially recognising or accrediting educational institutions or study programmes. Diploma mills, and the certificates they sell, are not officially accredited or recognised either in the country where they are based or elsewhere.

The selling of fake diplomas appears to be a flourishing industry. A study concerning the American situation revealed that this industry had a total turnover of 1 billion dollars in the period from 1995 until 2005.[25] According to a British Internet database (Accredibase™), designed and administrated by the company "Verifile Limited", 271 unaccredited institutions and unrecognised accrediting agencies claim to operate from the United Kingdom. In this respect, the UK is by far the leader within Europe. The Netherlands comes second, with 30 institutions.[26] Of course, we have to deal with more or less rough estimations in this respect. It is difficult to determine the scope of the problem: diploma mills operate under the radar screen of legitimacy, as do those who receive degrees from diploma mills. But the situation looks quite alarming. European governments have to do their best to fight the problem, not

[20] Glenn/De Groof, op.cit, p 65.
[21] Further "diploma mill".
[22] Proposal to the Diploma and Accreditation Integrity Protection Act (HR 4535 IH).
[23] Not to be confused with Regis University in Colorado. See *New York Times*, 29 June 2008: "Diploma Mill Concerns Extend Beyond Fraud".
[24] Not to be confused with, for instance, Irish American University (Dublin) or National University of Ireland (Dublin). See *Irish Independent*, 8 January 2008: "State in threat to sue fake Irish university".
[25] A. Ezell and J. Bear, *Degree Mills: The Billion-Dollar Industry That Has Sold Over a Million Fake Diplomas*, Prometheus Books, (New York 2005).
[26] E.A. Cohen and R. Winch, *Diploma and accreditation mills: exposing academic credential abuse*, Verifile Accredibase, 20 January 2010, www.accredibase.com.

only – as said earlier – in the interest of the students but also to protect the quality and reliability of their national systems.

To conclude: questions
It is clear that the resolution of the Dutch Parliament poses interesting and important questions. Given the fact that the Netherlands does not have a regulation of this kind, would it be possible for it to legally protect the designation "university"? And if so, how is it done in other countries? This contribution attempts these questions. On the basis of information received from "local" experts and collected by literature study and legal documents, we have made an overview of regulations in several countries in and outside Europe, including the United Kingdom, and have tried to compare them in order to reach conclusions. This is just a first step. Due to a lack of sufficient data from most countries, we unfortunately could not assess the practice of law enforcement, as reflected in media attention, court sentences or government decisions. Whether this practice is until now not well developed in most countries, or is carefully kept out of publicity, is not known.

2. Selection of countries; research questions

A quick scan may already show that a lot of countries protect the designation "university" through legislation. In what follows, the article takes a closer look at five of them: Belgium (the community of Flanders), Germany (the federal state of Baden-Württemberg), the United Kingdom (especially England and Wales), Austria and Australia. The choice has not been based on hard criteria. It has been important to focus on western countries that are mutually compatible with regard to the socio-economical and cultural status and climate. Furthermore, it has been important that the relevant information was available and accessible. Australia is the more interesting, because it has a very open system of higher education. As a key player in the GATS-negotiations it has proved to be very much in favour of borderless higher education.[27]

This research has been geared towards the exploration of two main questions:

a. How is the protection of the designation university and of academic titles formally regulated?
b. How are these rules enforced?

Question (a) leads us to consider the goal and scope of the researched rules. Does the specific country have a system of accreditation (or governmental recognition) of private law institutions, and if so, how does this system relate to the protective rules? For instance, is it possible for institutions of a foreign background to make an appeal against or under the protective rules? In this respect, also the nature and organisation of the authority that is responsible for the execution of the rules have been taken in consideration. Question (b) leads us to the type of law enforcement. Is it done by private law, criminal law or administrative law? What is the procedure and what are the sanctions?

[27] Stéphan Vincent-Lancrin, Cross-border Higher Education: trends and perspectives, in: OECD, Centre for Educational Research and Innovation, *Higher Education to 2030*, volume 2: Globalization, (Paris 2009), p 76.

The following sections of the article provide an overview of regulation in the different countries. In the final two section, comparative remarks are made and conclusions are drawn.

3. Belgium – Flanders

Prohibitive rule
Section 4 of the decree on the structure of higher education in Flanders[28] enumerates the universities that are recognised. Consequently, their educational programmes are funded by the Flemish Community.[29] Section 6, first sentence, of this decree states:

> "As universities in the Flemish Community, only the institutions referred to in section 4 are allowed to lay claim to the designation university and to present themselves as such".

The tenor of this provision is that other institutions than those referred to in section 4 of the decree, such as university colleges ("hogescholen") or private institutions do not have the right to call or present themselves as universities. The decree on the structure of higher education in Flanders does not provide for sanctions in a case where section 6 is violated. The Belgians make use of the Protection of the Higher Education Titles Act from 1933,[30] which provides a penalty clause with regard to those who unlawfully grant academic diplomas and certificates that award academic degrees or that have such an appearance, by their wording, of being lawful. The maximum penalty imposed on this offence is three months imprisonment and/or an index-linked fine, originally a thousand franks (twenty Euros), but by now a much higher amount.

Registration / recognition
Universities and university colleges are not the only relevant higher education institutions in the Flemish legal order. In addition, section 8 of the decree distinguishes "registered institutions for higher education". Such registered institutions, that must meet a series of legal requirements, cannot call themselves "university" or present themselves as such. After their registration, they (only) have the legal right to grant diplomas or certificates for their accredited programmes.[31] Section 8 contains the general conditions for the registration of institutions, which must have:

- At least one educational programme that has been successfully subjected to governmental accreditation;[32]

[28] Decree of the Flemish Community, B.S. 14 August 2003.
[29] Although the same applies to university colleges (perhaps the closest translation of the Dutch word: "hogescholen"), we restrict ourselves for brevity's sake to the situation of the universities, and not only here but also in the other country-reports.
[30] B.S. 27 september 1933.
[31] Jan De Groof and Frank Hendriks, Accreditatie in het hoger onderwijs in Vlaanderen en Nederland (Accrediting higher education in Flanders and the Netherlands), *Tijdschrift voor Onderwijsrecht & Onderwijsbeleid*, maart-april-mei-juni 2006, p 247-356, especially p 283 and further.
[32] The competent body in this respect is the Dutch-Flemish Accreditation Authority, settled in The Hague.

- A sufficiently developed infrastructure to supply higher education;
- A sufficiently developed financial and governance structure to allow students to finish their higher education.

Foreign institutions can also pass the accreditation and registration procedure. An additional condition that applies to them is that they have to prove that they were already recognised by the authorities of the country where they had their principal seat. The registration expires, if during a period of two years the institution has not offered any education programme that passed the test of the accreditation authority. The sole consequence of the expiration is the automatic loss of the institution's legal right to grant diplomas or certificates for their accredited programmes.

4. Germany – Baden-Württemberg

Prohibitive rule

Section 75 of the Landeshochschulengesetz (Universities Act) of Baden-Württemberg (LHG) contains a provision with regard to the protection of the designation "university" and the like. The first part of subsection 1 of the section says (in the author's translation):

> The title "Universität", "Pädagogische Hochschule", "Kunsthochschule", "Musikhochschule", "Fachhochschule", „Duale Hochschule" or „Studienakademie" in German or in its translation in another language may only be used by the institutions named in section 1 of this Act. Furthermore, the indication "Hochschule", „Duale Hochschule" or "Fachhochschule", be it alone or in a combination of words, be it in German or in its translation in another language, may only be used by „Hochschulen" that are recognised by the State or by ecclesiastical „Hochschulen" as meant in section 9 of the Constitution of the Land Baden-Württemberg. Private „Hochschulen", that are recognised by the State and that have an independent right to grant doctoral degrees, may use the designation „Universität". Other non governmental institutions are not allowed to use the title university or its synonym in a foreign language or to use an indication that can be confused with it".[33]

If we restrict the meaning of the quoted part to the legal indication of "Universität" (or its synonym in another language), we can conclude that this indication may be used exclusively by:

(1) The public law institutions that are named in the LHG; and

(2) Private law institutions that are recognised by the government of Baden-Württemberg as "wissenschaftliche Hochschule" or "Universität". According to section 70, subsection 4, LHG, the recognised "Hochschulen" have to use an indication in their name that refers to the

[33] The overall German term for higher education institution is "Hochschule". The Germans know a dual system of "wissenschaftliche Hochschulen" (scientific Hochschulen), which are synonymous with "Universitäten" on the one hand, and "Fachhochschulen" (professional Hochschulen) on the other hand. The English translation that the Germans use of "Hochschule" is "university", which is different from the Dutch and Flemings, who speak of "university colleges" when they point to their "hogescholen" (considered to be the equivalent of the German "Fachhochschule"). Therefore, the English translation of "Universität" is university, but university is not always similar to "Universität".

bearer or the domicile and that holds the element: governmental recognised university ("staatlich anerkannte (Fach)hochschule").[34]
In the second part of subsection 1 of section 75 LHG two other categories of institutions may bear the designation university:
(3) Foreign institutions may use the designation university (or its synonym in another language), as far as they are recognised as university according to the law of the country of origin. Exempted in this category are institutions from other member states of the European Union. Yet, the exact meaning of this exemption is not at all clear. We presume that towards "Hochschulen" from other EU-countries "softer" conditions are applicable, but we do not know in what sense and to what extent they are softer.
(4) An institution may refer in its name to an existing "Universität", if the "Universität" in question has granted its permission.

A breach of section 75 LHG amounts to an offence. Persons or institutions found guilty of this offence can be fined to a maximum of 100,000 Euros. The ministry of science of Baden-Württemberg has the power to investigate any possible breach.[35]

Recognition
Private law institutions can file an application with the government of Baden-Württemberg to be recognised as "Hochschule". The government has the power to recognise an institution if it performs tasks within the meaning of the LHG. As a consequence, the recognised institution may not carry out fundamental changes in its organisation or activities, without permission of the government. The recognition as "Hochschule" can only be granted if:

- The educational programmes meet the legal requirements,
- It is guaranteed that only persons who meet the conditions for admission that apply to a corresponding public law Hochschule are admitted to the educational programme.
- It is guaranteed that persons, who have education and research as a main occupation, meet the conditions for appointment that apply to a corresponding public law Hochschule.
- The size of the teaching staff is similar to that in corresponding public law Hochschulen.

An important legal consequence of recognition is that later changes of the educational programme need be accredited by a recognised accreditation authority, and need be reported to the ministry. Violation of these rules is an offence and violators can be fined to a maximum of 100,000 Euros.

5. United Kingdom

Prohibitive rule

[34] For instance „SRH Hochschule Heidelberg, staatlich anerkannte Fachhochschule" or „Evangelische Hochschule Freiburg, staatlich anerkannte Hochschule, etc.".
[35] Section 75(4) LHG, in combination with sections 35 and 36 of the federal Criminal Offences Act (Gesetz über Ordnungswidrigkeiten).

The law is contained in three separate Acts of Parliament: the Education Reform Act 1988; the Further and Higher Education Act 1992 (FHEA); and the Teaching and Higher Education Act 1998 (THEA). Until the FHEA came into force, in 1992, institutions could only be universities with degree awarding power when they had been established or recognised as such by an Act of Parliament or Royal Charter. This group of universities has stayed intact ever since. However, the system has been opened up by the FHEA. From 1992 onwards other higher education institution on British soil would have to file an application to qualify for the power to award legally protected degrees or to use the term university in its name.

An institution in the further or higher education sector may not provide, or offer to provide, education services using a name which includes the word "university" unless the inclusion of that word is authorized or approved. For these purposes, approval means approval by a body called the Privy Council,[36] and authorized means authorized by a separate Act of Parliament or by a Royal Charter.[37] Those operating such an institution must not refer to the institution using the name "university" unless this approval or authorization has been granted.[38] Institutions wishing to use the word "university" in their name would have to apply to do so and may also apply for recognition to award degrees and certain other awards.[39] In considering whether to approve a new name for an institution the Privy Council must seek to avoid a name which is or is likely to be confusing.[40]

An institution's affiliation to a university does not give that institution the right to use "university" in its title unless it receives approval to do so.[41] Some institutions, especially those which are affiliated to universities, have described themselves as a "university college". This style of name has been seen by some of these institutions as having benefits in terms of esteem and enhanced recruitment (staff and student). These institutions are mostly former colleges of education (teacher training colleges) which over the years have expanded the range of their courses and whose degrees are officially awarded not by them but by the university to which they are affiliated.[42] An institution that is authorised to use the name

[36] For details of the Privy Council and its work in approving various matters in the field of higher education, go to: http://www.privy-council.org.uk/output/Page27.asp
[37] THEA, s.39(1).
[38] THEA, s.39(2).
[39] FHEA, ss.76 and 77 (as amended by the THEA s.40). Those who offer unrecognised awards (i.e. awards by bodies that are not prescribed as recognised) may be guilty of an offence: 1988 Act ss.214–216. As regards bodies which are 'recognised', see the Education Reform Act 1988 s.216 and the Education (Recognised Bodies) (England) Regulations 2007 (SI 2007/2688) (as amended by the Education (Recognised Bodies) (England) (Amendment) Order 2008 (SI 2008/2889), and (same) (Wales) Order 2007 (SI 2007/2795) (W.235) (as amended by SI 2009/667 (W.59)); the Education (Listed Bodies) (England) Order 2007 (SI 2007/687) (as amended by the Education (Listed Bodies) (England) (Amendment) Order 2008 (SI 2008/2888)); the Education (Listed Bodies) (Wales) Order 2007 (SI 2007/2794) (W.234) (as amended by the Education (Listed Bodies) (Wales) (Amendment) Order 2009 (SI 2009/710) (W.62)). The legislation is accessible via http://www.dcsf.gov.uk/recognisedukdegrees/index.cfm?fuseaction=content.view&CategoryID=9
[40] FHEA, s.77(5).
[41] See *R. (on the application of Liverpool Hope University College) v Secretary of State for Education and Employment* [2001] E.L.R. 52, CA.
[42] One institution, which used the name Liverpool Hope University College, found when the 1998 Act came into effect that it could no longer use this name as it was not approved. This institution mounted a legal challenge, which was based on the argument that the manner in which the changes were implemented amounted to an abuse of Parliament and a disproportionate interference with the rights

"university" is to be treated as a university for all purposes, but not if that word is added to "college, as a "university college".[43]

Also, the Companies Act 2006 holds provisions concerning the protection of the designation university. Section 55 of the Act requires the prior approval of the Secretary of State for the name of a company to be registered if it includes a word or expression specified in regulations. Section 1194 makes similar provision for prior approval for a name under which a person carries on business. Sections 56 and 1195 require the applicants first to seek the view of a Government department or other body, where one is specified, to use a particular word or expression and where such a requirement applies. The Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009 (SI 2009/2615) specify (among others) "university" as a sensitive word for these purposes. The Regulations specify the Department for Business, Innovation and Skills as the body whose views must be sought by the applicant.[44]

Violation of each of the provisions mentioned may lead to a maximum fine of £ 1,000. When violating provisions of the higher education legislation or the Companies Act, the institution can be subjected to an investigation by Trading Standards, a locally organised governmental body operating for the benefit of consumer's protection. The powers of Trading Standards find their legal basis in the Companies Act 2006.

Degree awarding powers

If they meet the relevant criteria and on the basis of an application, institutions can become a part of the official higher education system. The heart of the matter is the governmental recognition of the power to grant legally protected degrees. Section 76(1) FHEA holds a provision in this respect, which also can be seen as a prohibition to grant degrees without governmental approval:

> (1) The Privy Council may by order specify any institution which provides higher education as competent to grant in pursuance of this section either or both of the kinds of award mentioned in subsection (2)(a) and (b) below.

The Privy Council is also competent with regard to the conferral of degree awarding powers. For that purpose institutions have to file an application and have to meet an extensive list of criteria, which for England and Wales is included in the already mentioned "Guidance for Applicant organisations in England and Wales". Consequently, section 214, first subsection, of the Education Reform Act provides:

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of the college contrary to the EC Treaty. This claim was rejected by the Court of Appeal in 2001: *R (Liverpool Hope University College) v The Secretary of State for Education and Employment*, [2001] ELR 552. This institution then used the approved name "Liverpool Hope". It applied for and was granted power to award taught degrees in 2002. In 2005 the Privy Council approved its current name "Liverpool Hope University". It has now applied for powers to award research degrees. For further historical details of this institution's transformation into a "university", go to http://www.hope.ac.uk/about-hope/history.html.

[43] 1992 Act s.77(4) as amended.

[44] See for a copy of these regulations: http://www.opsi.gov.uk/si/si2009/uksi_20092615_en_1.

(1) Any person who, in the course of business, grants, offers to grant or issues any invitation relating to any award—

(a) which may reasonably be taken to be an award granted or to be granted by a United Kingdom institution; and

(b) which either—

(i) is described as a degree; or

(ii) purports to confer on its holder the right to the title of bachelor, master or doctor and may reasonably be taken to be a degree;

shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Violation may lead to a maximum fine of £ 5,000.

6. Austria

Prohibitive rule

Austria is a federation, in which the powers concerning higher education are exercised at the central level. Under the University Organisation and Studies Act (Universities Act 2002) persons or institutions are liable to punishment, when they behave themselves improperly as recognised institutions or when they grant fake academic degrees. Section 116 states:

(1) Whosoever shall wilfully

1. improperly award, bestow or bear a designation particular to a domestic or foreign higher education system; or

2. one or more domestic academic titles, or

3. a degree or title identical or similar to a domestic or foreign degree or title,

shall commit an administrative offence punishable by the responsible district administrative authority with a fine of up to EUR 15,000 unless the act is a criminal offence within the competence of the courts or is subject to a heavier penalty under other administrative regulations.

(2) The award, bestowal or use of an academic title or identical or similar designation is, in particular, improper if it:

1. originates from an institution which is not of equivalent status to a post-secondary educational institution;

2. originates from an institution not recognised by its country of domicile as a post-secondary educational institution;

3. was not obtained by virtue of appropriate studies and examinations or academic or artistic achievement;

4. was not awarded on an honorary basis in recognition of the recipient's high standing in academic circles due to his/her academic or artistic achievements, or for outstanding services to the scholarly or cultural activities of a post-secondary educational institution.[45]

[45] Translation given by the Austrian authorities. See http://www.cepes.ro/hed/policy/legislation/pdf/Austria.pdf .

The provision is aimed at Austrian and foreign institutions that are settled on Austrian soil. An institution is liable to punishment when it behaves like a higher education institution recognised according to Austrian law or the law of the country of origin. Violation of section 116 leads to a maximum fine of EUR 15,000, unless the act is a criminal offence or is subject to a heavier penalty under other administrative regulations. With regard to the protection of so called “Privatuniversitäten” (private universities) there is a separate regulation, laid down in section 3 of the University Accreditation Act of 1999, which we will discuss below.

Recognition

Beside the public universities, covered by the Universities Act 2002, there are recognised private universities. A private university is a non-state institution, accredited by the federal Austrian Accreditation Council (“Akkreditierungsrat”). A private university may be governed by a private law body, a state or a religious community. The relevant law is provided by the University Accreditation Act of 1999, of which section 2 holds the conditions under which non-state institutions are eligible to obtain accreditation as a private university:

> (1) To obtain accreditation as a private university the educational institution filing the application must fulfil the following requirements:
>
> 1. It must be a legal entity registered in Austria.
> 2. It must offer study programmes or units of such, in one or more scientific or artistic disciplines, leading to an academic degree of international standard, awarded for fulltime study programmes of at least three years duration, or study programmes in continuation of such programmes. The initial application must be accompanied by the curricula of the planned study programmes.
> 3. It must appoint teaching staff of international scientific or artistic standard for the main subjects contained in the planned study programmes. The initial application must, as a minimum, be accompanied by legally binding preliminary employment contracts for a sufficient number of staff for the planned study programmes.
> 4. The required staff, facilities and equipment must be existent at the time of commencement of the planned study programme. Proof thereof must be furnished when the initial application is made.
> 5. The private university’s activities must be in accordance with the following principles: freedom of sciences and their teaching (art. 17 of the Basic Law on the General Rights of Nationals, Imperial Legal Gazette No. 142/1867), freedom of scientific and artistic activity, the dissemination of the arts and their teaching (art. 17a of the Basic Law on the General Rights of Nationals), interaction between research and teaching, diversity of academic and artistic theories, methods and doctrines.
>
> (2) The award of academic degrees homonymic to the academic degrees according to the Universities Act 2002 requires that the respective study programmes are, with

> regard to the result of overall education, comparable to a subject-relevant study programme according to the Universities Act 2002.[46]

The accreditation has a maximum duration of five years. The title of private university implies a certain legal status. Section 3 of the University Accreditation Act states:

> (1) For the duration of accreditation in accordance with this Act, the educational institution shall be entitled to refer to itself as a ”private university”. The private university and persons working there shall be entitled to use designations and titles associated with higher education, in all cases with the addendum ”of the private university …”. The private university shall, further, be entitled to award academic degrees to graduates of the study programmes offered by it, even with the same denominations as foreseen for academic degrees by the Universities Act 2002, Federal Legal Gazette I No. 120/2002. The academic degrees homonymic to the academic degrees according to the Universities Act 2002 shall have the legal effects of the academic degrees according to the Universities Act 2002.

The University Accreditation Act does not contain a specific provision to enforce the rule of section 3. For that, section 116 of the Universities Act 2002 appears to offer a legal basis.

7. Australia

Prohibitive rules

The official Australian higher education system consists of institutions which have directly been approved by law or by decision of authorities at the federal or state level. Under the Higher Education Support Act 2003 (HESA) higher education providers are divided into three groups: Table A, Table B and Table C.[47]

Table A providers are eligible for all funding under the Act. There are 39 Table A providers, in most cases they are public law universities. Table B providers are eligible for research funding and can be allocated national priority student places in fields such as nursing and education. There are three providers of this type, which all are private, national Australian institutions: Bond University, the University of Notre Dame Australia and Melbourne College of Divinity. Table C providers are accredited and approved “overseas higher education institutions”, which have established a branch on Australian soil.[48] They can be allocated national priority student places in fields such as nursing and education. There is one active provider of this type, Carnegie Mellon University. This is a North-American institution, which also has branches in Portugal, Greece, Qatar, India, Singapore, South-Korea and Japan.[49]

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[46] Translation done by the Austrian authorities. See http://www.bmwf.gv.at/fileadmin/user_upload/wissenschaft/recht/englisch/E_UniAkkG.pdf .

[47] Ben Jongbloed, Higher education in Australia, IHEM Country report, CHEPS, Enschede November 2007, p 18.

[48] According to the definition in the “National Protocols”, to which we will refer later again, an “overseas higher education institution” is: “a university or other recognised higher education institution whose legal origin is in a country or countries other than Australia”.

[49] See http://www.cmu.edu/global/flash/index.html.

In Australia, the word “university” cannot be used without approval of the minister at the central (federation) or decentralized levels (states, Territories), who is responsible for higher education. Institutions that use the designation “university” without approval commit an offence pursuant to state legislation. In the Australian federation the decentralised levels are exclusively competent in the field of education, including higher education.
The following sections of the Higher Education Act 2001 of New South Wales[50] give a good example of prohibitive legislation:

> *13 Unlawful use of title "university"*
> A person must not represent that an Australian institution is a university unless the institution is an Australian or overseas university.
>
> *14 Unlawful provision of higher education courses*
> A person must not represent that an Australian institution provides any degree or post-graduate course, or is authorised to provide any degree or post-graduate course, unless:
> (a) the institution is:
> (i) an Australian or overseas university, or
> (ii) an Australian or overseas higher education institution, and
> (b) in the case of a course provided otherwise than by an Australian university:
> (i) the course is accredited under Division 2 in relation to the institution, or
> (ii) if the institution is an overseas university or higher education institution, the course is approved in accordance with the National Protocols.
>
> *15 Unlawful conferral of higher education qualifications*
> (1) A person must not represent that an Australian institution has conferred, or is authorised to confer, a degree or post-graduate qualification unless:
> (a) the institution was or is, as the case requires:
> (i) an Australian or overseas university, or
> (ii) an Australian or overseas higher education institution, and
> (b) the degree or post-graduate qualification was conferred or is authorised to be conferred, as the case requires, in connection with a person's successful completion of:
> (i) a higher education course, or
> (ii) a thesis, dissertation or other body of research, and
> (c) in the case of a degree or post-graduate qualification conferred, otherwise than by an Australian university, in connection with a person's successful completion of a higher education course:
> (i) the course was or is, as the case requires, accredited under Division 2 in relation to the institution, or
> (ii) if the institution was or is an overseas university or higher education institution, the course was or is, as the case requires, approved in accordance with the National Protocols.

[50] See http://www.austlii.edu.au/au/legis/nsw/consol_act/hea2001153/ .

16 Provision of false or misleading information

A person must not, in or in connection with any application under this Act, make any statement that the person knows to be false or misleading.

As we can see, the prohibitive rules cover (a) the use of the title “university” without approval, (b) the wrongful representation, showing or behaviour as an Australian university or “University College” and (c) the wrongful provision of courses and granting qualifications as an Australian university or “university college”. For each of the above offences the maximum penalty is 200 units, which represents an amount of 22,000 Australian dollars, comparable to nearly 14,000 Euros. There is one general exemption. The prohibition of the use of the titles “university” or “university college” will not extend to those bodies where the context makes it clear that there is no connection with an existing university.[51]

Law enforcement is not only a matter of criminal law in this field. There are also instruments of public regulatory law. Under the federal Corporations Act 2001[52] power is given to the Australian Securities and Investment Commission to direct a company to change its name. If the word "university" was being used unlawfully in an organisation's name it could be directed to cease using the name. Under schedule 6, part 4, of the Corporations Regulations 2001 the word "University" is a word which can only be used in an organisation's name with the permission of the federal Minister for Education, Training and Youth Affairs.

Recognition

In October 2007 the “Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA)”[53] adopted (national) Protocols that cover the whole territory of Australia and that concern approval processes in higher education. These national Protocols, meant to be implemented in both federal and state law, reflect the current practice at the central and decentralised levels.[54] The national Protocols concern all higher education institutions that operate, want to operate or claim to operate on Australian soil. Furthermore, they relate to offshore activities of all Australian higher education institutions and to partnerships of higher education institutions with, among others, commercial providers.[55]

The general criteria for the approval of the use of the term university are laid down in criteria D5 – D7 of the national Protocols:

- ☐For the use of the title “university” are eligible higher education institutions that provide education which is extending (*criterion D5*) “across a range of broad fields of study (including Research Masters and PhDs or equivalent Research Doctorates in *at least three* broad fields of study)”.
- ☐For the designation “university college” are eligible higher education institutions that provide education which is extending (*criterion D6*) “across a range of broad fields

[51] Part 3, criterion 4 of the national Protocols. The example of “University Avenue Newsagent Pty Ltd” is generally referred to.
[52] See the collection of Acts on http://www.weblaw.edu.au .
[53] The MCEETYA is composed of ministers from the states, the Territories, the federation and New-Zealand, who are responsible for education, employment, training, and youth affairs.
[54] MCEETYA, National Protocols for Higher Education Approval Processes, October 2007.
[55] National Protocols, op.cit, part I, nr. 12.

of study (including up to Masters coursework degrees in *at least three* broad fields of study and Research Masters and PhDs or equivalent Research Doctorates in *at least one* broad field of study)".

☐For the title "specialised university" are eligible higher education institutions that provide education which is extending (*criterion D7*) "one or two broad fields of study (including Research Masters and PhDs or equivalent Research Doctorates)".

Institutions that are allowed to use the designation university or the like may execute "self-accrediting" powers and may grant qualifications, which meet the relevant titles and circumscriptions, laid down in the Australian Qualifications Framework.
Every application for approval has to be accompanied by an advice of a Government Accreditation Authority (GAA).[56] The advice must be the result of an investigation and a consecutive report of a panel of experts, who are independent from the applicant, and by which a judgment is made about the validity of the application and – if necessary – with indication of the conditions under which approval has to be given. The investigation contains an evaluation of the education programmes and/or the organisation of the institution according to the criteria that are laid down in the Protocols, and includes in normal cases an inspection of the institution's facilities. The investigation may also extend to the financial solidity of the institution and to the question whether the applicant and the senior-employees of the institution are the right and suitable persons to manage a higher education institution and higher education courses. Accreditation is given for a maximum of five years.

8. Comparison

Nature and level of the legal norm
In all the examined countries the legal protection of the designation "University" has been regulated, thereby justifying their selection. In every case, the regulation takes place under the highest form of law at the actual competent level of the state organisation. In the United Kingdom and Austria it is exclusively done at the central level, in Germany and Belgium partly at the central and decentralized level, and in Australia exclusively at the decentralized level.
In all the examined countries the protective legal norm has a twofold orientation: (1) the fixation of a historically grown stock of (mostly public) universities by "automatic" recognition and protection of the designation "University" by Act or law and (2) additional procedures for the allowance (recognition/accreditation) by a governmental body of new (private law) institutions acceding to the official higher education system.

There must be exceptions to the prohibitive rule against using the designation "University" without approval of the competent authorities. According to Australian law the prohibition will not extend to those bodies where the context makes it clear that there is no connection with

[56] See national Protocols, part A, criteria 5.1 and further. The term GAA refers to a series of "agencies" on the federal, state and Territorial level that are included in the "Register of Recognised Education Institutions and Authorised Accreditation Authorities". This register forms a part of the Australian Qualifications Framework.

an existing university. Moreover, it should not extend to religious institutions, which are founded and organised on the basis of a non secular legal order.

Law enforcement

Concerning law enforcement, three issues are noteworthy. In the first place, there is a clear cultural difference between continental European and the Anglo-Saxon countries. The latter do not confine themselves to possible instruments of public law. In the United Kingdom and Australia also general business law (Companies Act, Corporation Act) has been deployed for the prevention and suppression of deceit through the misleading use of the designation "University". In this respect, universities are placed in the same category as (private law) companies. Moreover, with respect to the enforcement of rules of public higher education law, the investigating bodies are primarily active in the field of company law, such as Trading Standards in the United Kingdom. In the continental European systems the enforcement of rules protecting the designation "University" is an exclusively public matter.

Secondly, all countries have predominantly chosen the involvement of criminal law, in most cases with a fine as a penalty. Flanders is the only jurisdiction where there is the possibility of imprisonment when someone breaches the protective provisions. Although in the examined countries administrative law plays a role too,[57] it is hardly seen as an equal alternative to penal sanctions. There is anyhow a striking discrepancy in the severity of the fines. Where for example Austria and Australia provide for a maximum fine of 15,000 Euros, Baden-Württemberg holds out the prospect of a fine amounting to a maximum of 100,000 Euros when an institution wrongfully uses the designation "University".[58]

Finally, nearly all the examined countries make a distinction between two tracks of law enforcement: the prevention of and fight against breaches of the legal prohibition to use the designation "University" on the one hand, and counteracting the granting of non-accredited or not legally recognised qualifications by institutions that pretend to belong to the official higher education system.

Protection of private institutions

Accession to the official higher education system can take place by accreditation or recognition (whether or not accompanied by accreditation). In Austria, Flanders and Australia applicant private institutions need to go through an accreditation procedure with regard to their organisation and/or their activities. The consequence of accession is a protected status for the institution, either by sharing the legal designation "university" (all examined countries, except Flanders) or by legal recognition of its activities concerning education and degree awarding power (all jurisdictions, Flanders included).

The position of foreign institutions

[57] For instance the suspension or withdrawal of an approval, accreditation and recognition is supposed to be common practice in most countries.

[58] Of the countries examined, the German state of North Rhine Westphalia (which is not included in this contribution) leads with a maximum fine of 500,000 Euros.

In all the examined countries there is a possibility for foreign (private)[59] institutions to become part of the national, official higher education system. Within the scope of the recognition and/or accreditation procedure, a more or less "national" test takes place. For the accreditation of private universities Austria refers especially to internationally accepted standards. In the other countries it is more or less explicitly required that the activities of institutions match with the rules and ends of the national system, concerning education and the granting of degrees. Only in Baden-Württemberg is it explicitly recognised that institutions that have their origin in one of the member states of the EU enjoy a preferred position in comparison with foreign institutions of a non-EU background.[60] Several of the examined countries (Flanders, Baden-Württemberg) seem to take the situation in the country of origin as guiding point of departure: is the institution legally protected or is it or its education recognised by the government of the country of origin? Other countries (United Kingdom, Australia and Austria) seem to rely on the requirements of the national legal system for their judgment.

9. Final remarks

Why protect the designation "university"? For a long time it has not been a disputed issue in the countries of Western Europe. Only the public institutions that were recognised by law were supposed to be universities. But the situation has changed. On a fundamental level, the national higher education systems have been opened towards the outside world by the rise of student mobility and of market- and cross border-activities of (foreign) private law institutions, for which especially the development of the EU and the internet have provided possibilities. A number of European countries have by now concluded that their familiar protective norms with respect to academic activities need to be accompanied by norms to protect the institutional qualities as a university. This is a rather new development in respect of which two goals can be distinguished. First, consumer protection: students need to know whether a specific institution is sound and socially reliable. Second, protection of the national higher education system: the existing institutions need to be safeguarded against (private law) institutions that ruin the general reliability and market of higher education.

Especially the aspect of consumer protection needs to be considered. Improvement of student mobility between member states of the EU is a permanent objective of EU-policy and national policy in most countries. Is it enough then, as seems to happen in most of the continental European countries, only to interfere afterwards on the basis of the violation of provisions of criminal law? The answer should be negative. It is of great importance that the

[59] From the point of view of the receiving State all foreign universities are by definition private law institutions, even when they are operating in the country of origin as public law entities. There are two obvious reasons for that. Only because of the fact that these institutions are legal persons according to private law they are capable to take up cross border activities. Besides, public law is – at least in the field of higher education – in essence national law. It loses its characteristics from the moment that, due to going abroad, the influence of (the sending) national government on the organisation and actual activities of the institution is no longer predominant.

[60] The scope of this special position and the actual consequences of it are not very clear though. Also the German state of North Rhine Westphalia allows a preferred position in this respect. See section 75 of the Hochschulfreiheitsgesetz Nordrhein-Westfalen (Universities Freedom Act North Rhine Westphalia).

governments can use effective instruments of regulation at an already early stage. The Australian example of governmental powers to direct an institution to change its name or to cease using a name, on the basis of business law provisions, could be such an instrument. Moreover, from the standpoint of consumer protection the great differences in the penalties for breaching the protective rules across the examined countries is hard to justify. It becomes more and more relevant to discuss law enforcement policy and penalties in this field as a part of the European higher education area.